

Judge Barnes found claimant's left hand injury on December 1, 2011 was not the natural and probable consequence of his work-related back injury which occurred on August 9, 2005. Judge Barnes further denied claimant's request for attorney fees due to this post-award action being pursued as a preliminary hearing under K.S.A. 44-534a, as opposed to being pursued under the post-award medical statute, K.S.A. 44-510k.

Claimant requests review of whether Judge Barnes erred in finding the left hand injury was not compensable as the direct and natural result of his August 9, 2005 low back injury, her denial of payment of his medical bills, as well as her denial of attorney fees.

Respondent argues claimant's left hand injury was not the natural and probable consequence of his original back injury and therefore Judge Barnes's Order should be affirmed. Respondent argues that attorney fees are not statutorily allowed when a post-award request for medical treatment is conducted using the preliminary hearing procedure in lieu of the procedure allowed under the post-award medical benefits statute.

FINDINGS OF FACT

Having reviewed the evidentiary record, the stipulations of the parties, and the parties' briefs, the Board makes the following findings of fact and conclusions of law:

On July 22, 2009, Judge Barnes issued an Award finding that claimant's injured his back on August 9, 2005. Judge Barnes determined claimant had a 22.5 percent functional impairment followed by a 53.5 percent work disability.

Claimant's attorney filed an application for post-award medical and attorney fees on July 29, 2009 and set a post-award medical hearing for August 20, 2009. Judge Barnes issued an Agreed Nunc Pro Tunc Award on August 3, 2009 concerning the compensation due and authorized Dr. Steven Hendler for medication management and treatment. Claimant's attorney cancelled the post-award medical hearing on August 14, 2009.

Claimant injured his left hand at home on December 1, 2011. An application for preliminary hearing was filed on January 11, 2012.

A preliminary hearing was held by Judge Barnes on March 6, 2012. Claimant testified that he has chronic back pain and left leg neuropathy due to scar tissue. Claimant testified that his leg gives out and will buckle when he steps down, as if it is not there, so he loses his balance, falls and hurts himself. Claimant testified:

I was in the garage and I have a rack that holds, you know, different pieces of iron and metal, whatever; and going to the steps, I happened to -- my leg happened to give out. And that's where my hand was placed to catch my fall, and there was a piece of copper rod that had been broken off at the end, which has kind of a knife like end on it, I mean it's not a smooth end by any means, and it punctured my left hand.¹

¹ P.H. Trans. (Mar. 6, 2012) at 11.

Claimant sought medical treatment at the Kansas Medical Center (KMC) emergency room. He presented his wife's Blue Cross Blue Shield (BCBS) card for insurance purposes, but testified that he advised the staff that his injury was work-related because of the neuropathy in his left leg and his leg giving out. BCBS paid the emergency room bill.

The KMC record states, "Patient was working with a copper rod when he jammed it into his left hand causing a puncture wound." Claimant needed four stitches in the palm of his hand. The claimant testified he was not working with a copper rod when injured.

Judge Barnes July 9, 2012 Order succinctly states:

1. Claimant's preliminary hearing requests are considered and denied. Claimant has failed to sustain his burden of proof that the injury incident on December 1, 2011 is the natural and probable consequence of the original injury of August 9, 2005.
2. The medical bills incurred are not payable under workers compensation.
3. As Claimant pursued this action as a preliminary hearing as opposed to a post award medical hearing, attorney fees are not appropriate.²

PRINCIPLES OF LAW AND ANALYSIS

The burden of proof is on the claimant to establish his right to an award of compensation.³ Post-award medical treatment can be awarded if the need for medical care is necessary to cure and relieve the natural and probable consequences of the original accidental injury which was the subject of the underlying award.⁴

K.S.A. 2005 Supp. 44-510k states:

- (a) At any time after the entry of an award for compensation, the employee may make application for a hearing . . . for the furnishing of medical treatment.
...
- (c) The administrative law judge may award attorney fees and costs on the claimant's behalf consistent with subsection (g) of K.S.A. 44-536 and amendments thereto

² ALJ Order (July 9, 2012) at 1.

³ K.S.A. 44-501(a).

⁴ K.S.A. 44-510k(a).

K.S.A. 44-536(g) states:

(g) In the event any attorney renders services to an employee . . . subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services . . . on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis.

. . .

If the services rendered herein result in a denial of additional compensation, the director may authorize a fee to be paid by respondent.

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is compensable. In *Jackson*,⁵ the court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

The *Jackson* rule does not apply to new and separate accidental injuries:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.⁶

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*,⁷ claimant injured his knee in 1973. There was no dispute that the original injury was compensable. In 1975, while working on his farm, claimant twisted his knee stepping down from a tractor. Later, while watching television, claimant's knee locked up on him. He underwent additional surgery. The Kansas Supreme Court upheld a district court ruling that claimant's injury in *Gillig* was responsible for the surgery in 1975.

⁵ *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

⁶ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

⁷ *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

The Kansas Court of Appeals later reconciled *Gillig* and *Stockman* by noting *Gillig* involved a torn knee cartilage which never properly healed, but *Stockman* involved a distinct reinjury of a back sprain that had subsided.⁸ The *Graber* court found that its claimant suffered a distinct traumatic injury outside the ordinary pattern of life and not simply a mere aggravation of a weakened back.

In *Logsdon*,⁹ the Kansas Court of Appeals reiterated rules from *Jackson* and *Gillig*:

Whether an injury is a natural and probable result of previous injuries is generally a fact question.

When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

"When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."¹⁰

A post-award preliminary hearing that is intended to be final is reviewed as a final ruling.¹¹ Post-award preliminary hearings are not final where the issue of attorney fees is left undecided or additional evidence will be presented.¹² Judge Barnes' order is final, as the attorney fee issue is up for immediate review and there is no showing that a full hearing or depositions will be scheduled. Claimant's appeal regarding the attorney fee issue is from a final order.¹³

⁸ *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

⁹ *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006).

¹⁰ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

¹¹ *Bryant v. U.S.D. No. 259*, 26 Kan. App. 2d 435, 438, 992 P.2d 808 (1999).

¹² *Quandt v. IBP*, 38 Kan. App. 2d 874, 879-80, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008).

¹³ Using preliminary hearing procedure to seek post-award medical could restrict an appeal to a single Board Member deciding issues reviewable under K.S.A. 44-534a(2) and K.S.A. 44-551(i)(2)(A). See *Siler v. U.S.D. No. 512*, 45 Kan. App. 2d 586, 589-91, 251 P.3d 92 (2011), *rev. denied* 293 Kan.____ (2012).

Compensability

Judge Barnes had the opportunity to personally observe the claimant's testimony and concluded that claimant failed to prove by a preponderance of the evidence that his left hand injury involving the copper rod was the direct and natural result of his original injury of August 9, 2005. As noted above, the KMC record states, "Patient was working with a copper rod when he jammed it into his left hand causing a puncture wound." The KMC report contains no mention that claimant fell due to his left leg giving out as a consequence of his prior accidental injury or due to left leg neuropathy.

The KMC record contains a section asking the context of the injury, i.e., whether by fall, blow, laceration, crush or burn. The word laceration was circled; the word fall was not circled. The KMC record contains no mention that claimant's left leg gave out or claimant fell due to neuropathy or fell as a result of his original injury. The report details claimant's prior medical history, including lumbar spine surgery, low back pain, GERD, and tonsils and adenoid removal, but contains no mention that the claimant fell on December 1, 2011 due to prior leg symptoms. Quite simply, the only medical evidence introduced at the preliminary hearing does not support claimant's assertion that he fell at home as a consequence of his 2005 low back injury. The Board affirms Judge Barnes' ruling that claimant failed in his burden of proving that his left hand injury of December 1, 2011 was the direct and natural result of his 2005 low back injury.

Attorney Fees

Attorney fees in workers compensation cases are allowable only where expressly authorized by the Act.¹⁴ K.S.A. 44-510k allows attorney fees. K.S.A. 44-534a does not comment about attorney fees. K.S.A. 44-536(g) provides that an attorney "shall be entitled to reasonable attorney fees" for legal services rendered "subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise," but if additional compensation is denied, "the director may authorize a fee to be paid by respondent."

Claimant asserts that *Siler*¹⁵ allows an award of attorney fees as a result of a post-award preliminary hearing. The issue of attorney fees is not mentioned in *Siler*. *Siler* approved the use of the preliminary hearing procedure under K.S.A. 44-534a to determine a claimant's right to medical treatment after a final award has been entered.¹⁶

¹⁴ *Lackey v. D & M Trucking*, 9 Kan. App. 2d 679, 687 P.2d 23 (1984).

¹⁵ *Siler v. U.S.D. No. 512*, 45 Kan. App.2d 586, 251 P.3d 92 (2011), *rev. denied* 293 Kan. ____ (2012)

¹⁶ *Id.*

Respondent asserts the plain language of K.S.A. 44-534a does not permit an award of attorney fees and that claimant, by proceeding under K.S.A. 44-534a, instead of K.S.A. 44-510k, is not entitled to any attorney fees. Respondent asserts that a statutory conflict exists between K.S.A. 44-536(g) and K.S.A. 44-510k, and that because K.S.A. 44-536(g) is an older and more general statute, the newer and more specific language of K.S.A. 44-510k concerning an award of post-award attorney fees is controlling.¹⁷

Both K.S.A. 44-510k and K.S.A. 44-536(g) contemplate post-award medical proceedings and an award of attorney fees. The former specifically pertains to the procedure to obtain post-award medical treatment, in addition to attorney fees. The latter is a more general statute which allows post-award attorney fees “in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise[.]” The Board does not see any conflict or inconsistency between K.S.A. 44-510k and K.S.A. 44-536. Both statutes allow attorney fees in post-award matters.

The fact that K.S.A. 44-534a does not comment on attorney fees whatsoever does not lead to the conclusion that a claimant cannot obtain attorney fees by way of a post-award preliminary hearing. K.S.A. 44-536(g) still allows for attorney fees in post-award matters. A post-award hearing concerning medical benefits may be conducted by following the procedure set forth in either K.S.A. 44-534a or K.S.A. 44-510k. Neither statute is the exclusive means to address post-award medical treatment.

If a specific statute concerning an award of post-award attorney fees is necessary when additional medical treatment is pursued, it would stand to reason that a specific statute concerning post-award attorney fees would also be necessary for review and modification proceedings.

The Board may review whether Judge Barnes committed error in declining to award attorney fees. While it is within Judge Barnes’ authority to award no attorney fees or the entire amount requested by claimant, she erred in concluding that an attorney is precluded from attorney fees by pursuing a post-award preliminary hearing under K.S.A. 44-534a in lieu of a post-award medical hearing under K.S.A. 44-510k. There is no statutory language preventing an award of post-award attorney fees where claimant pursues benefits through a preliminary hearing. Had the legislature intended to foreclose attorney fee awards in post-award preliminary hearings, it easily could have done so.

Accordingly, this case is remanded to Judge Barnes on this sole issue and to hold a hearing to determine whether attorney fees should be awarded to the claimant's attorney in reference to this unsuccessful request for medical treatment. Again, the Board is not passing judgment on whether any attorney fees should have been awarded.

¹⁷ Respondent’s Brief at 8-10 (filed Aug. 20, 2012).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁸ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated July 9, 2012, is remanded with regard to the ruling that attorney fees cannot be awarded against respondent when claimant conducts a post-award preliminary hearing, but the remainder of the Order is affirmed and remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of November, 2012.

BOARD MEMBER

BOARD MEMBER

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¹⁸ K.S.A. 2011 Supp. 44-555c(k).